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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

DATE: **JUL 20 2012**

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on April 22, 2011, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted as a motion to reconsider and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is a law office. It seeks to employ the beneficiary permanently in the United States as a legal assistant. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also determined that the petitioner had failed to establish that it had the ability to pay the proffered wage, and denied the petition accordingly.

The petitioner filed an appeal. The AAO dismissed the appeal on April 22, 2011, concluding that the visa category of any other worker (requiring less than two years of training or experience) selected on the Form I-140, Immigrant Petition for Alien Worker (Part 2, paragraph g) was not supported by a Form ETA 750.¹ The AAO also concluded that the petitioner had not established its continuing financial ability to pay the proffered wage of \$58,905 as of the priority date of April 30, 2001.² On appeal, the AAO found an additional basis for ineligibility in that the petitioner failed to submit sufficient evidence to establish that the beneficiary possessed the specific requirements of the labor certification as of the priority date. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing

¹ The Form ETA 750 submitted would only support a filing for a skilled worker.

² In its April 22, 2011 decision, the AAO also raised questions about the beneficiary's claimed Social Security number on the Forms 1099 submitted and compensation paid, as well as the sole proprietor's claimed monthly household expenses. It is noted that these concerns have not been addressed on motion and have not been resolved. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Through counsel, the petitioner submits a motion to reconsider the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Although counsel initially contended that new evidence was to be submitted, the evidence submitted was not new. Therefore, the AAO accepts counsel's submission as a motion to reconsider.

On motion, counsel asserts that the petitioner had the ability to pay the proffered wage of \$58,905 per year. Accompanying the motion are copies of the sole proprietor's Schedule C, Profit or Loss From Business that were already submitted to the underlying record. Counsel asserts on motion that the sole proprietor paid thousands of dollars for outside legal and professional services, as shown on Schedule C, that he could have used to pay the beneficiary's wage. No details or documentation of this theory have been provided. As noted in the record and in the AAO's prior decision, the petitioner claims to have employed the beneficiary during the relevant period. It is unclear how monies expended toward outside legal and professional services could have been allocated to pay the proffered wage to the beneficiary who was already employed by the petitioner. Further, according to the ETA 750, her job was that of performing office clerk duties and interacting with Spanish-speaking clients.³ The

³ The record does not specify any workers, state their wages, verify their full-time employment, or provide evidence that the petitioner could have allocated compensation from this outside labor to the

undocumented assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also contends on motion that for 2001, the offered wage should have been prorated as the priority date established by the ETA 750 was April 30, 2001. United States Citizenship and Immigration Services (USCIS) will not, however, consider 12 months of income, such as was reflected in the sole proprietor's federal income tax returns, towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly audited income statements or pay stubs, the petitioner has not submitted such evidence for 2001.

Finally, with regard to the ability to pay the proffered wage, counsel indicates that in 2006 and 2007, \$47,418 and \$36,205 taken as subscriptions expenses could have been reduced to pay the proffered wage to the beneficiary. Counsel is not correct. Those sums represent the total of various "other expenses," claimed on Schedule C. Dues and subscriptions actually amounted to \$755 in 2006 and \$174 in 2007. Counsel additionally contends that payments such as Christmas bonuses, parking fees, and cell phone expenses paid by the petitioner to the beneficiary should somehow be considered as part of the petitioner's ability to pay. No actual documentation of such claims has been provided. The undocumented assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533 at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 at 506. It is further noted that no legal authority is cited obliging USCIS to include such expenses paid as part of the beneficiary's wages. USCIS will not consider such expenses as part of the beneficiary's compensation paid by the petitioner.⁴ The proposed salary on an approved labor certification is expressed as U.S. currency and not as a formula including the value of other expenses paid on behalf of a beneficiary. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40 (2003). Additionally, the regulation at 20 C.F.R. § 656.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

beneficiary, when she was already simultaneously employed by the petitioner. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that any of the legal and professional expenses claimed involved the same duties as those performed by the beneficiary. If that outside legal and professional contract worker performed other kinds of work, then the beneficiary could not be a replacement.

⁴The IRS treats certain fringe benefits as taxable and non-taxable. An employer reports taxable fringe benefits in box 1 of an employee's IRS Form W-2. Nontaxable fringe benefits are excluded from box 1 of an employee's IRS Form W-2. Examples of nontaxable fringe benefits include, but are not limited to, certain accident and health benefits, dependent care assistance (up to certain limits), group-term life insurance coverage, and health savings accounts (up to certain limits). See I.R.C. §§ 105, 129, 106.

As stated in the AAO's prior decision, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing ability to pay the proffered wage as of the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear. As indicated in its prior decision, the AAO found that the petitioner's adjusted gross income in 2001 and 2006 was less than the difference between the actual wage paid and the proffered wage. Further, in 2002, 2003, 2004, 2005 and 2007, the petitioner's adjusted gross income remaining after subtracting out the difference between the proffered wage and the actual wages paid to the beneficiary is insufficient to cover the sole proprietor's claimed monthly expenses. Additionally, as noted above, in the AAO's prior decision, the sole proprietor's self-estimated expenses were in question based on the mortgage interest claimed. This issue was not addressed in counsel's motion. As set forth in the AAO's decision of April 22, 2011 and as hereinabove discussed, the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date onward.

On motion, counsel reiterates his assertion that the beneficiary possesses the qualifying experience and states that copies of her class graduations have been submitted showing the subjects taken. Counsel does not specifically address the AAO's concerns expressed in its prior decision. The record reflects that the requirements of the Form ETA 750 includes 12 years of high school, two years and three months of training and no employment experience. Other special requirements as set forth in item 15 of Part A of the Form ETA 750 require "Spanish speaker; data processing especially Word Perfect; Outlook, legal office procedures and duties such as calendaring. As noted in the AAO's prior decision, to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House* 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The AAO specifically noted that the beneficiary's transcript from the Los Angeles School District and the course completion reports from East Los Angeles Occupational Center for classes such as computer operation, typing, data entry, office procedures, and business math and English did not clearly show that the beneficiary had either the full two years and three months of training required by the terms of the labor certification or possess the specific skills required in item 15 of the Form ETA 750A. The AAO further found that the beneficiary began working for the petitioner in April 2000, but did not finish the classes listed on the transcript until January 2001, so as to determine that she was a full-time student during that time. Thus, the AAO cannot conclude that the petitioner has demonstrated that the beneficiary possessed two years and three months of training, as well as the special requirements cited in item 15 of the Form ETA 750A.

Finally, counsel also reiterates the assertion that the unskilled worker visa category selected was just a "typing" error and that the petition should be approved in the skilled worker category under section 203(b)(3)(A)(i) the Act.⁵ As stated in the AAO's April 22, 2011, decision, there is no provision in

⁵ As the Form ETA 750 requires two years and three months of training, it only supports a skilled worker visa classification, which provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of

statute or regulation that compels USCIS to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The Form ETA 750 does not support the designated visa classification of “any other worker” (requiring less than two years of training or experience) and the petition remains denied on this basis.

The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of the priority date and that the beneficiary possessed the qualifications required by the labor certification. It is further noted that no new evidence or argument has been submitted on motion that would reverse the AAO’s previous finding that the labor certification provided does not support the approval of the petition for an unskilled worker visa category sought by the petitioner on the Form I-140.

The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider is granted. The prior decision of the AAO, April 22, 2011, is affirmed. The petition remains denied.

performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.